STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 21, 2014
v	No. 318633 Wayne Circuit Court
PIERRE LAMAR TAYLOR, Defendant-Appellee.	LC No. 11-009674-FC

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

The prosecution appeals by leave granted[1] the order of the trial court granting defendant's motion for a new trial. We reverse and remand for reinstatement of defendant's convictions and sentences.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises from a shooting death in Detroit on June 12, 2011 at the scene of a street race on Epworth Street, a two-lane street in Detroit. The victim, Amran Najy, and four other passengers, arrived at the scene of the street race in a 2009 Chevrolet Impala. Nagy was killed when a bullet was fired into the vehicle. An officer on the scene said that Najy was "slumped over, stuck in the vehicle." Another officer observed that a bullet "had gone through the trunk lid into the rear passenger seat on the . . . passenger side." Based on the testimony of several witnesses at trial, a jury determined defendant to be the shooter.

One witness, Robert Hanson, testified at trial that he frequently attended the street races, and that he saw the Impala arrive at the scene. Further, as the driver of the car made a U-turn on Epworth Street in order to clear the way for the street race, Hanson saw defendant pull out a black gun and fire it toward the car. Hanson identified defendant at trial, saying that he could "never forget his face" because defendant "shot one of [Hanson's] friends that [he hung] out with every day." Hanson, who was standing 18 to 20 feet from defendant, testified that he saw

[1] *People v Taylor*, unpublished order of the Court of Appeals, entered November 21, 2013 (Docket No. 318633).

defendant pick up the shell, throw it to his right, and tell a friend, "Oh, he's gonna be mad in the morning when he look[s] at that size of that bullet hole in his car." Approximately 10 minutes later, Hanson received a phone call and went to the intersection of Linwood Street and West Grand Boulevard, where he saw the Impala "mangled" on the median.

Two weeks later, Hanson saw defendant at the street races, and sent a text message to a detective with the license plate number of the car in which defendant arrived. Hanson identified defendant in a photographic lineup on July 24, 2011.

On cross-examination at trial, Hanson acknowledged that defendant was facing away from him when he fired the gun toward the Impala. Hanson testified that he then "walked up by" the side of the shooter and saw his face "[b]ecause he just shot at the car with all [of Hanson's] friends in it," and Hanson wanted to remember the shooter's face. On redirect examination, Hanson said that defendant "was acting like he had the gun" when Hanson and his friends arrived and were themselves forced to make a U-turn, and reiterated that he saw defendant shoot toward the Impala.

Hanson had given a substantially different statement to police on August 10, 2011. In Hanson's statement to police, he confirmed that he arrived at a street where drag races frequently occurred about three minutes before the arrival of the Chevrolet Impala that carried the shooting victim. When Hanson was asked if he saw anyone with a gun, he answered, "No[.] I saw a guy acting like he had a gun on his waist. He was putting his hand by his waist [and] telling us[, ']Get out the way![']" Hanson told the officer that, after the shooting, Joseph Saldivar, Hanson's cousin, pointed at defendant, the same man Hanson noticed "acting like had a gun," and said, "There's the guy that shot at [the] car." Hanson's statement to police was provided to defendant in pretrial proceedings, and defense counsel cross-examined Hanson at trial regarding the discrepancies between his direct trial testimony and his earlier statement.

Saleh Sayah was the driver of the Impala on the night of the shooting. He drove Najy and two others to Grand River Avenue and McGraw Street, in Detroit, to pick up a third friend. From there, the five men drove to Epworth Street to watch the races. As they went to leave, after 20 to 30 minutes, Sayah saw a man pull out a gun and point it at him. Sayah thought this indicated that he was driving in the wrong direction, toward the oncoming racing cars, so he put his hands up, apologized, and turned his car around. Sayah heard one gunshot as he drove away. Najy, who was in the rear passenger seat, said that he had been shot, and Sayah exited the car and observed a bullet hole in the trunk. Sayah then attempted to rush to the hospital, but lost control of the car on the way, and the car rolled over.

Sayah was hospitalized for "two or three weeks," and could not identify defendant in a photographic lineup after he was discharged. However, he identified defendant, at trial, as the shooter, noting that "[t]hat's how [the shooter's] hair was," and stating that he could "tell from that night. You can't forget somebody that . . . killed your friend . . . ." On cross-examination, Sayah said that the description of the shooter he gave to police did not include descriptions of the shooter's face, facial hair, or glasses. He remembered the shooter as a "dark skin[ned] black guy [with] half-braided hair," "about six feet tall, and he was skinny, and he had on dark clothing." Sayah admitted that, after Hanson testified, Sayah, Hanson, and three other witnesses, Fayez Mosed, Saldivar, and Hassem Salem, discussed the case, contrary to the trial court's admonition.

Saldivar, Hanson's cousin, was present in the area of the street races at Epworth Street and Linsdale Street on June 12, 2011. He recognized the occupants of the Impala as friends of Hanson. From his position on a curb, Saldivar saw defendant standing approximately three feet to his right, under a streetlight. When the Impala made a U-turn, the driver "came awfully close to" defendant, and Saldivar saw the Impala's driver "stick his hand up . . . to say[, 'I'm sorry.']" Defendant drew a black semiautomatic handgun, fired one shot "directly at the car" as it drove away, put the gun in his waistband, and said, "[H]e's gonna be mad in the morning when he sees the big[-]ass hole in this [sic] trunk." Defendant remained at the scene until police broke up the races 20 to 25 minutes later. Saldivar later identified defendant in a photographic lineup and at trial.

Salem was seated in the rear middle seat, and "looked [at defendant] right in the eyes" as the Impala was driving north toward Joy Road. Defendant was standing to the left of the Impala, "cussing," screaming, and gesturing at the occupants of the car. As Sayah turned the car around, Salem saw defendant's "hand go by his side," but he did not see defendant shoot. After Salem heard a gunshot, Najy, seated to Salem's right, learned over, clutching his chest, and said that he had been shot. Salem identified defendant at the preliminary examination and at trial. Prior to the preliminary examination, Salem was shown a photographic lineup and selected two individuals as possibly being the shooter, although he stated that the shooter's face looked "more like number six" which was a picture of defendant.

The preliminary-examination testimony of Iran Tarrant, who could not be located, was read into the record at trial under MRE 804(a)(2) and (a)(5). Tarrant was standing at the corner of Epworth Street and Linsdale Street in the early-morning hours of June 12, 2011. He saw the Impala make a U-turn on Epworth Street and drive away from the crowd, and saw defendant remove a handgun from the "front of his pants," point it toward the Impala, and fire one shot. After the gunshot, Tarrant began to record a video of defendant, using his cell phone, which he later gave to police. Tarrant also identified defendant in a photographic lineup.

On April 10, 2012, defendant was found guilty of involuntary manslaughter, MCL 750.321, and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. He was sentenced, on May 3, 2012, to 6 to 15 years' imprisonment for the involuntary-manslaughter conviction, and two years' imprisonment for the felony-firearm conviction. Defendant filed a motion for a new trial on January 9, 2013, arguing that witnesses violated the trial court's sequestration order and that his trial counsel rendered ineffective assistance by (1) erroneously advising defendant to testify at the preliminary hearing, (2) failing to seek suppression of the identification testimony of Saleh and Hanson, (3) failing to locate and call Tarrant as a witness for the defense, (4) failing to review the testimony of an alibi witness before calling him, (5) failing to impeach Hanson with his statement to police that his cousin, Saldivar, told him that defendant was the shooter, and (6) failing to move for a mistrial based on violation of the sequestration order.

The prosecution responded in part that defendant failed to demonstrate violation of the sequestration order and that the claim that defendant's attorney erroneously advised him to testify at the preliminary examination would require an evidentiary hearing. Concerning defendant's argument that his trial counsel rendered ineffective assistance for failing to impeach Hanson, the prosecution acknowledged that Hanson's "statement does suggest that Hanson's

subsequent identifications of Defendant both at the photo array and at trial were based on Saldivar's pointing Defendant out to Hanson," but argued that defendant could not demonstrate prejudice because "Hanson was not the only identifying witness" and trial counsel's overall performance did not "lack[] active and capable advocacy."

In a memorandum of law submitted to the trial court, the prosecution did "not disput[e] that . . . Hanson[] gave false testimony at trial," and provided a postconviction statement from Hanson in which he admitted that he lied under oath "because he was nervous." The prosecution conceded that, "[i]f this Court finds that the trial prosecutor . . . presented [Hanson's] testimony knowing it to be false, Defendant should get a new trial," and stated that "the task of this Court . . . is to determine whether the prosecutor in this case knowingly presented what is now undisputed[ly] the perjured testimony of" Hanson. Defendant responded that the prosecution is "charged with knowledge of the police officers involved, including those officers who took Hanson's statements, as knowledge and conduct of the police is attributable to the prosecutor."

The trial court held an evidentiary hearing over two days. Rajesh Prasad, the trial prosecutor, testified that he spoke to Hanson before the preliminary examination, telling him that he must "tell the truth," "listen to the questions that are being asked," and "be respectful." Prasad said that he explained to Hanson that the questions Hanson would be asked were "designed for [Hanson] to explain, in [his] own words, what [he] saw and what [he] heard. Not what other people told [him]." Prasad did not recall speaking to Hanson again before trial. He read into the record an excerpt from his opening statement:

> And you're going to hear witnesses tell you, specifically, you're going to hear from a Joseph Saldavar [sic]. And you'll hear from Robert Hanson. These are just witnesses who were there at the drag race at the time. And they're going to tell you exactly what they saw. Specifically, that this defendant [fired] one shot at the vehicle, the white [I]mpala, as it's driving away.

Prasad admitted that there was "an inconsistency" between Hanson's police statement, which Prasad had reviewed before trial, and Hanson's direct-examination testimony. Asked whether he was surprised when he heard Hanson's trial testimony, Prasad answered, "It would only be a guess when I would say I think I was [surprised]. But that's a guess." He "did not know that [Hanson] lied when he was testifying in trial. All [Prasad] knew was that [Hanson] testified differently from his previous statement." Prasad did not recall whether he spoke with the officer-in-charge after Hanson testified.

Hanson denied having planned to lie under oath and maintained that he did so because he was "nervous." He admitted that he did not see the shooter's face, and said that no prosecutor or police officer spoke to him regarding the disparity between his police statement and his trial testimony.

The trial court granted defendant's motion for a new trial, finding that Hanson's false testimony was material because Hanson "was one of the material witnesses who corroborated testimony of other witnesses, and who basically positively identified the defendant as shooting." Reading the quoted portion of Prasad's opening statement, the court further found that "it sounds . . . as if Mr. Prasad knew that [Hanson] was going to testify that the defendant raised the

gun and fired[, w]hich is completely inconsistent with [Hanson's] prior statement." The court concluded that "there was some knowing presentation by the [p]rosecution" and that "the prosecution did knowingly present perjured testimony, that is, the perjured testimony of Robert Hanson."

This appeal followed.

II. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision to grant or deny a new trial. *People v Terrell*, 289 Mich App 553, 558; 797 NW2d 684 (2010). "An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes." *Id*. at 559. "Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error." *Id*. at 559 (citations omitted). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008).

III. ANALYSIS

The prosecution argues that the trial court clearly erred when it found that the trial prosecutor knowingly presented perjured testimony. We agree. "A trial court may grant a new trial to a criminal defendant on the basis of any ground that would support reversal on appeal or because it believes that the verdict has resulted in a miscarriage of justice." *Terrell*, 289 Mich App at 559, citing MCR 6.431(B). "[A] conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009), citing *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). Knowingly presenting false testimony, *Giglio v United States*, 405 US 150, 153; 92 S Ct 763; 31 L Ed 2d 104 (1972), citing *Mooney v Holohan*, 294 US 103, 112; 55 S Ct 340; 79 L Ed 791 (1935), and failing to correct it once presented, *Giglio*, 405 US at 153, citing *Napue*, 360 US at 269, are species of discovery violations, *United States v Agurs*, 427 US 97, 103; 96 S Ct 2392; 49 L Ed 2d 342 (1976).

"[A] conviction will be reversed and a new trial will be ordered, but only if the tainted evidence is material to the defendant's guilt or punishment," *Aceval*, 282 Mich App at 389, citing *Smith v Phillips*, 455 US 209, 219; 102 S Ct 940; 71 L Ed 2d 78 (1982), meaning that "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," *Aceval*, 282 Mich App at 389, citing *Agurs*, 427 US at 103. "Thus, it is the misconduct's effect on the trial, not the blameworthiness of the prosecutor, which is the crucial inquiry for due process purposes." *Aceval*, 282 Mich App at 390, citing *Phillips*, 455 US at 220 n 10 (internal punctuation omitted). "[A] prosecutor has an obligation to correct perjured testimony that relates to the facts of the case or a witness's credibility." *People v Gratsch*, 299 Mich App 604, 619; 831 NW2d 462 (2013), vacated on other grounds 495 Mich 876 (2013).

In its order granting defendant's motion for a new trial, the trial court found that it was "undisputed that . . . [Robert Hanson] perjured himself at trial," that it was "undisputed that the

testimony of [Hanson] was material in that he identified Defendant as the shooter," and that "the prosecution did knowingly present . . . the perjured testimony of [Hanson]." The prosecution argues that the trial prosecutor's acknowledgment of "an inconsistency" between Hanson's police statement and his direct-examination testimony does not "logically or legally lead to the conclusion that the prosecutor presented Hanson's testimony knowing that it was false."

At trial, the prosecutor's opening statement was not specific regarding the particulars of each witness's testimony; however, it suggested that Hanson would identify defendant as the shooter, which would contradict Hanson's prior police statement:

> And you're going to hear witnesses tell you, specifically, you're going to hear from a Joseph Saldavar [sic]. And you'll hear from Robert Hanson. These are just witnesses who were there at the drag race at the time. And they're going to tell you exactly what they saw. Specifically, that this defendant [fired] one shot at the vehicle, the white [I]mpala, as it's driving away.

Hanson's trial testimony was consistent with the prosecutor's preview and did not include the fact that Hanson learned of the shooter's identity from Saldivar. Defendant cross-examined Hanson on the inconsistency, and Hanson admitted that he did not tell the officer about the color of the gun or having seen it fired. In a post-trial statement, Hanson said that the version of events in his first police statement was correct and he testified that he saw the shooting occur because he was "nervous." The trial prosecutor testified, at an evidentiary hearing, that he knew that Hanson "testified differently from his previous statement," but "did not know that [Hanson] lied when he was testifying in trial."

This evidence arguably supports the conclusion that the prosecutor knew, before trial, that Hanson would contradict his police statement. It does not, however, lead to the conclusion that the prosecutor knew that Hanson's trial testimony was false. In *People v Lester*, 232 Mich App 262; 591 NW2d 267 (1998), overruled on other grounds by *People v Chenault*, 495 Mich 142, 146 (2014), this Court held that the presence of marihuana in a government witness's house did "not conclusively establish that [the witness] lied when she testified that she had abstained from [marihuana] for over a year," and that a discrepancy between the same witness's testimony and that of a witness for the defense did not require the prosecution to "disbelieve its own witness when testimony from another witness contradicts her." *Id*. at 277-278. This Court has also held that the fact that a government witness contradicts his own earlier statement is insufficient to establish that the prosecution knowingly presented perjured testimony where there was "no evidence that the prosecutor attempted to keep the contents of those previous statements from defendant" and "defense counsel was afforded ample opportunity to impeach the witnesses' credibility at trial with the prior statements." *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Because, as in *Parker*, there is no evidence that the prosecution suppressed Hanson's first police statement, and because defendant cross-examined Hanson on the discrepancy between his police statement and his direct-examination testimony, causing Hanson to admit to the jury that he failed to tell police that he saw the shooter or the gun, the trial court clearly erred when it found that the prosecution knowingly presented perjured testimony.

Even if the record contained evidence sufficient to find that the prosecution knew that Hanson lied on direct examination, we do not find Hanson's testimony to have been material

under the facts of this case. For the purposes of perjury analysis, evidence is material if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Aceval*, 282 Mich App at 389, citing *Agurs*, 427 US at 103. Here, Hanson's claim to have seen defendant pull out a gun and shoot toward the Impala was cumulative of Saldivar's testimony. Further, Sayah witnessed the shooting and, although he was unable to identify defendant in a photographic lineup, he identified defendant at trial based on his hair, skin complexion, build, and height. Salem did not see defendant hold or shoot a gun, but remembered that defendant became visibly upset when the Impala proceeded in the direction of the oncoming racing cars, saw defendant's "hand go by his side," and heard the single gunshot. Tarrant, like Saldivar, saw defendant remove a gun from the "front of his pants," point it toward the Impala, and fire once. Salem and Tarrant also identified defendant in separate photographic lineups. In sum, four other witnesses identified defendant as the shooter, albeit some more confidently than others. And while Hanson improperly identified defendant as the shooter, he was able to identify defendant as the person at the scene who was "acting like had a gun," and as the same person Saldivar identified as having been the shooter. Therefore, it was not reasonably likely that Hanson's testimony could have affected the jury's judgment. *Aceval*, 282 Mich App at 389.

Reversed and remanded for reinstatement of defendant's convictions and sentences. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra